(2)

No. 90-408

In The

Supreme Court of the United States

October Term, 1990

COUNTY OF YAKIMA and DALE A. GRAY,
YAKIMA COUNTY TREASURER,

Petitioners,

v.

CONFEDERATED TRIBES AND
BANDS OF THE YAKIMA NATION,

Respondent.

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH DAKOTA, OREGON, SOUTH DAKOTA, UTAH, AND WASHINGTON IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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MISCELLANEOUS

Amici curiae states of California, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, and Washington, through their respective Attorneys General, respectfully submit a brief in support of the petition for writ of certiorari herein pursuant to Sup. Ct. R. 37.5.

INTEREST OF AMICI CURIAE

It has long been accepted that the first proviso to section 6 of the General Allotment Act of 1887[1] constitutes federal consent to the taxation of lands patented in fee to tribal members under such statute. *E.g., Squire v.*

[1] Section 6 of the General Allotment Act, 24 Stat. 390, 392 (1887) (codified as amended at 25 U.S.C. § 349), originally provided in part "[t]hat upon completion of said allotments and the patenting of lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they reside[.]" The first proviso, which expressly addresses the tax status of fee-patented lands, was added by the Act of May 8, 1906, 34 Stat. 182, 183: "*Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to the sale, encumbrance, or taxation of said lands shall be removed and said lands shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent[.]" *See Bordeaux v. Hunt*, 621 F. Supp. 637, 639 (D.S.D. 1985), *aff'd sub nom. Nichols v. Rysavy*, 809 F.2d 1317 (8th Cir.), *cert. denied*, 484 U.S. 848 (1987) (discussing adoption of the 1906 amendment). Section 6 has not since been amended.

Capoeman, 351 U.S. 1, 7-8 (1956) ("[t]he literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee"); 50 L.D. 691, 694 (1924) ("[w]hen an allottee voluntarily applies for a removal of restrictions [by requesting issuance of a fee patent] prior to the expiration of the period of exemption originally provided for, the granting of such application subjects those lands to taxation even in the hands of the original allottee"); *see generally* F. Cohen, *Handbook of Federal Indian Law* 259 (1942) ("[s]hould [an allottee] . . . apply for the issuance of a fee patent and be accorded one pursuant to law [under the General Allotment Act], there seems no reason to believe that his lands would not thereby be subject to state taxation"); United States Dep't of Interior, *Federal Indian Law* 859 (1958) (same). The Court accordingly construed comparable language in the Act of June 21, 1906, 34 Stat. 325 (1906),[2] adopted six weeks after the 1906 proviso, as representing "the consent of the United States to state taxation" of lands patented in fee pursuant to

[2] This act read in relevant part:

> That all restrictions as to the sale, encumbrance, or taxation for allotments within the White Earth Reservation in the State of Minnesota, now or hereafter held by adult mixed-blood Indians, are hereby removed, and the trust deeds heretofore or hereafter executed by the Department for such allotments are hereby declared to pass the title in fee simple, or such mixed bloods upon application shall be entitled to receive a patent in fee simple for such allotments[.]

34 Stat. 353.

such statute. *County of Mahnomen v. United States*, 319 U.S. 474, 477 (1943).[3] State taxing authority over fee-patented lands was also consistent with the policy underlying the 1906 amendment to section 6; i.e., issuance of a fee title carried with it a Secretarial determination that the allottee was "competent and capable of managing his or her own affairs" and would therefore assume not only citizenship but also the ordinary responsibilities attendant to such status – including the obligation to pay taxes with respect to allotted land. S. Rep. No. 1998, 59th Cong., 1st Sess. 2 (1906) ("[t]he bill [eventually enacted as the 1906 amendment] also provides and authorizes that the Secretary of the Interior, in his discretion, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her own affairs, may cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, encumbrance, or taxation of said lands shall be removed, and if that shall be done it would follow as a matter of course, under the provisions

[3] The issue in *Mahnomen* was whether the affected allottee had voluntarily paid taxes between issuance of the fee patent and expiration of the 25-year trust period applicable to the allotment when initially made. *See Choate v. Trapp*, 224 U.S. 665 (1912) (Choctaw and Chickasaw allottees were entitled to the benefit of the entire period of exemption from state taxation provided for when they accepted fee patents even though Congress passed a later general statute authorizing taxation of lands held by Indians of the class to which the allottees belonged). The Court concluded that the allottee had paid the challenged taxes voluntarily during such period. No claim was made for taxes assessed for years after expiration of the original trust period, since the validity of that assessment was assumed.

of this bill, that the allottee would then become a full citizen and no longer subject to the exclusive jurisdiction of the United States"); *cf. United States v. Mitchell*, 445 U.S. 535, 544 n.5 (1980) (trust period restriction on alienation and taxation established " 'for a sufficient length of time for the new citizen to become accustomed to his new life, to learn his rights as a citizen, and prepare himself to cope on an equal footing with any white man who might attempt to cheat him out of his newly acquired property' "); *Goudy v. Meath*, 203 U.S. 146, 149 (1906) ("the purpose of the restriction upon voluntary alienation [under the General Allotment Act] is protection of the Indian from the cunning and rapacity of his white neighbors, and it would seem strange to withdraw this protection and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it from taxation").

The amici curiae states generally treat fee-patented allotment lands owned by a tribe or tribal member no differently for property taxation purposes from lands owned in fee by nonmembers. Although the precise amount of lands so held has not been determined, the spate of recent litigation over this issue[4] indicates that

[4] Aside from the within matter, there are at least four other suits challenging application of state property taxes to fee-patented Section 6 land. *Cross v. Washington*, No. 89-35224 (9th Cir.); *United States v. South Dakota*, No. 90-301 (D.S.D.); *Assiniboine and Sioux Tribes v. Montana*, No. CV-89-271-BLG (D. Mont.); *Blackfeet Tribe v. Adams*, No. CV-89-100-GF (D. Mont.).

substantial acreage is involved.[5] The Court of Appeals' decision, insofar as it remanded the proceeding below to the District Court with instructions to determine whether "the checkerboard jurisdiction that would result from Yakima County's taxation would affect [the Yakima Nation] in a demonstrably serious way" (Pet. 27a-28a; 903 F.2d at 1218), invites factually complex and repetitive litigation in an area where state authority has been rightly assumed for at least 85 years.

SUMMARY OF ARGUMENT

The Court of Appeals correctly concluded that the first proviso in section 6 of the General Allotment Act authorizes application of Washington ad valorem taxes to real property allotted pursuant to the General Allotment Act and now held in fee by the Yakima Nation or its members. In reaching this conclusion, the lower court

[5] The allotment process contained in the General Allotment Act was formally terminated under section 1 of the Indian Reorganization Act of 1934, 25 U.S.C. § 461. During the allotment period, approximately 90 million acres passed from trust status to nonmember ownership under a combination of surplus and fee-patented land purchases. *See* H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934). At the time of the Indian Reorganization Act's passage, 17.6 million acres were held by original allottees or their heirs. II F. Prucha, *The Great Father* 869 (1984). How much of the latter lands was held in trust and the extent to which the fee-patented portion has been alienated to nonmembers in unknown, as is the extent to which fee-patented lands may have been returned to trust status or the amount of fee lands alienated to nonmembers prior to 1934 but later reacquired by a tribe or its members.

applied the settled principle that such lands could not be subjected to those taxes absent express congressional authorization. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987). What the court affirmed in one respect, however, it effectively denied in another by remanding for further evidentiary hearings on whether application of the ad valorem taxes would "affect [the Yakima Nation] in a demonstrably serious way[.]" Pet. 28a; 903 F.2d at 1218. Remand for such hearings was clearly improper since the requisite taxation authority had already been found. The opinion below in that regard runs contrary to decisions by this Court and, in view of the substantial amount of allotment activity on western and midwestern Indian reservations, raises the specter of complex litigation concerning this issue on other reservations in the amici curiae states.

ARGUMENT

The Court of Appeals meticulously addressed each of the Yakima Nation's grounds for its challenge to the plain meaning of the language in section 6 removing "all restrictions as to . . . taxation of [fee-patented] land". It first examined, *inter alia*, *Squire v. Capoeman*, 351 U.S. 1 (1956), which was found to support "Congress's clear intent to permit the state to tax fee patented land owned by Indian tribes or their members." Pet. 14a; 903 F.2d at 1212. The court next distinguished the holding in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), that the introductory language of section 6, which subjected fee-patent allottees "to the laws, both civil and criminal, of the State or Territory in which they may

reside[,]" was an insufficiently explicit authorization for the imposition of personal property and cigarette taxes on tribal members, reasoning that *Moe* was not concerned with the effect of the first proviso. Pet. 15a-18a; 903 F.2d at 1213-14. It finally rejected any contention that the proviso had been impliedly repealed by later legislation, since "mere repudiation of [the allotment] *policy* is insufficient to render a statute legally void." Pet. 20a; 903 F.2d at 1215 (emphasis in original).

Having determined that the first proviso in section 6 provided the requisite consent to imposition of state and ad valorem taxes upon fee-patented lands, the Court of Appeals' analysis should have ended. The court nonetheless continued on to consider whether such taxation could be prohibited by "the checkerboard jurisdiction that would result from finding that Yakima County had power to tax." Pet. 23a; 903 F.2d at 1216. It then concluded, based upon *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 109 S. Ct. 2994 (1989), that application of the state law may be preempted if the tribe could establish its political integrity, economic security, health or welfare was imperiled by the taxation. The Court of Appeals' reasoning in this respect reflects misunderstanding of the plenary power doctrine and *Brendale*.

This Court recognized in *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985), that, "[i]n keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians." *Accord Cabazon*, 480 U.S. at 207 ("The Court has consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and

their territory,' . . . and that 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States[.]' . . . It is clear, however, that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided") (citations omitted); *United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance"). When such plenary power is exercised, any common-law developed immunity against state taxation which tribes or their members possess is eliminated and the taxes may be applied without offending the Supremacy Clause.

Brendale does not teach the contrary. It arose from a claim to exclusive tribal zoning jurisdiction over nonmember-owned lands within the Yakima Reservation and was resolved by determining the scope of the tribe's retained, inherent regulatory authority. Four members of the Court, speaking through Justice White, stated that a tribe never has such regulatory power, at least absent consent, and must vindicate any "protectable interest" against state zoning regulation of nonmember lands through state or federal administrative or judicial proceedings. 109 S. Ct. at 3008.[6] The Yakima Nation

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[6] Justice Stevens, writing for himself and Justice O'Connor, concluded that tribal zoning authority over nonmember lands could exist in limited circumstances – i.e., as to discrete areas within a reservation where nonmember ownership is *de minimis* and a tribe implicitly retains the right to maintain such areas' "unadulterated character." 109 S. Ct. at 3015. The

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possesses no such protectable interest here because, as the Court of Appeals found, Congress authorized states in section 6 to tax fee-patented lands. That such authorization may result in some, but not all, lands within a reservation being taxed is thus irrelevant for preemption purposes. *Cf. Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 505 (1979) ("checkerboard jurisdiction is not novel in Indian law, and does not, as such, violate the Constitution").[7] Equally irrelevant is

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remaining three justices would have found exclusive tribal zoning jurisdiction over the nonmember lands, reasoning that tribes should be deemed to retain inherent regulatory authority over all nonmember activity within the reservation unless limited by statute or treaty and that concurrent application of tribal and state zoning jurisdiction was "by its very nature . . . unworkable." *Id.* at 3020, 3026 (Blackmun, J., concurring and dissenting). Tribal regulatory authority, of course, is not at issue here, and the only significance of *Brendale* is whether it somehow established a free-standing "protectable interest", defined in terms of a tribe's political integrity, economic security, health or welfare, which may serve to negative an otherwise explicit congressional grant of authority to states. As developed in the text below, *Brendale* neither could nor did authorize creation of such an interest in derogation of section 6's taxation proviso.

[7] *Moe* is compatible with this conclusion. There the Court rejected an argument that allottees, to the extent they became subject "to the laws, both civil and criminal, of the State or Territory in which they may reside[,]" enjoyed no immunity against state personal property and cigarette taxes. The Court observed that a contrary conclusion would mean "for *all* jurisdictional purposes – civil and criminal – the Flathead Reservation has been substantially diminished in size." 425 U.S. at 478 (emphasis in original). It later stated that "Congress by its

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whether the state taxation may have a demonstrably negative effect on the tribe, since the existence of such an impact cannot serve to obviate the congressional consent in the first proviso. Indeed, if credited, the Court of Appeals' analysis would permit courts, through application of common-law principles, to repeal on a selective basis admittedly valid statutory provisions and would mean states could never rely conclusively on express congressional consent to tax tribes or their members. Neither *Brendale* nor any other decision sanctions that result.

The Court of Appeals' improper application of *Brendale* implicates more than academic concerns. Allowing state property taxes to be challenged on the ground that they imperil a tribe's political integrity, economic stability, health or welfare will expose many state and local governments to expensive and likely drawn-out challenges to important sources of revenue. Not only is there risk that this revenue may be interrupted during the litigation's course, but there is also no assurance that multiple litigation as to a particular reservation will not occur because the effect of the taxation on tribal interests

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more modern legislation has evinced a clear intent to eschew any such 'checkerboard' approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area." *Id.* at 479. *Moe* accordingly does not stand for the proposition that the existence of a checkerboard jurisdictional pattern is itself a basis for preemption; rather, it found the possibility of such jurisdiction a basis upon which to construe a generally worded statutory provision as not containing the requisite express authorization to tax.

can vary significantly over time. The lower court's decision thus invites recurrent, complex litigation as to particular parcels within a single reservation.[8] The practical ramifications of the opinion below are significant and, when combined with the manifest error in its *Brendale* analysis, warrant review.

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[8] As the petitioners observe (Pet. 10-11), application of the *Brendale* demonstrable harm test in a taxing situation presents numerous factual considerations. Those and other considerations will form the basis of a detailed inquiry into the effect of state taxation on *individual* pieces of property within a reservation, since it is entirely possible that, while a tax will have no impact on a tribe's economic security, political integrity, health or welfare when applied to some landowners, a stronger showing of tribal prejudice may be present as to other landowners. The effect of state taxation on particular landowners also may vary from year to year, thereby limiting any affirmative relief against a state to discrete tax years and raising the possibility of annual challenges and attendant litigation.

CONCLUSION

The amici curiae states respectfully request that the petition be granted and this matter be scheduled for plenary briefing and oral argument on the merits. Alternatively, the Court of Appeals' judgment should be summarily reversed to the extent it remanded for further evidentiary hearings the question of whether application of the Washington ad valorem tax imperils the Yakima Nation's political integrity, economic security, health or welfare.

Respectfully submitted,

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